IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JONATHON JOEL MICHITSCH, Appellant.	)	2 CA-CR 2006-0217 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200300037

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Jeffrey Buchella — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Jonathon Michitsch was convicted of knowingly transporting for sale a dangerous drug (methamphetamine) with a weight of more than nine grams. Based on Michitsch's admission that he had two prior felony convictions, the trial court sentenced him as a repetitive offender to a partially aggravated prison term of eighteen years. On

appeal, Michitsch contends the trial court erroneously denied his motion to suppress evidence found on his person after he had arrived at a residence during the execution of a search warrant. He also asserts the trial court improperly considered a letter, purportedly authored by a witness who testified at the suppression hearing, that was contained in the court's file in a different case in which the witness was a criminal defendant. We affirm.

¶2 In reviewing the denial of a motion to suppress evidence, we consider only that evidence adduced at the suppression hearing and view the facts in a light most favorable to upholding the trial court's ruling. *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005). We review the ruling "for an abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶3 On a December morning in 2002, law enforcement personnel executed a search warrant at the home of Teresa T. and Dennis R. Teresa told two officers she was expecting a man named "John" to deliver methamphetamine to her. She did not know John's last name but said it was similar to "McIntosh." She also told at least one of the officers John usually carried a handgun.

¶4 Soon thereafter, a man arrived at Teresa's house and knocked on the door. A third officer greeted him with the words, "Hey, man, come on in." Michitsch entered. According to Michitsch, he had neither knocked nor been greeted, but had taken "one step into the house" before he "was grabbed, pulled in the rest of the way by an officer," and then patted down by one of two officers who held his arms behind him. He testified one of

the officers "patted down my pocket, stuck his hand in it and pulled out the contraband," after which Michitsch recalled being immediately handcuffed.

¶5 The officers' testimony portrayed a different version of events. The officer who had greeted Michitsch testified Michitsch had entered the house and briefly conversed with a detective who had interviewed Teresa and then submitted to that detective's patting him down. The detective, John Maddux, testified he had been approaching the living room from another area of the home when he had heard a man enter. Maddux testified Teresa's eyes "lit up" and her "head came up," actions which he interpreted as nonverbal communication that the man who had arrived was the one she had spoken about. Maddux asked the man's identity and learned his name was "John."

¶6 Because Michitsch had entered premises that were then being searched and Maddux believed he might be armed and carrying methamphetamine, Maddux had Michitsch place his hands on his head and patted him down for weapons. While doing so, he felt a large bag in Michitsch's right jacket pocket that he "immediately recognized . . . as a bag of methamphetamine or bags containing methamphetamine." He then placed Michitsch under arrest. Maddux testified he had previously been "involved in at least one hundred methamphetamine investigations" and had handled the drug in "both rock and crystalline form."

¶7 An investigative stop is lawful "if the officer has articulable, reasonable suspicion, based on the totality of circumstances, that the suspect is involved in criminal activity." *State v. Box*, 205 Ariz. 492, ¶ 16, 73 P.3d 623, 628 (App. 2003); *see also United*

States v. Arvizu, 534 U.S. 266, 122 S. Ct. 744 (2002); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). In determining whether an officer has "acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. In addition, A.R.S. § 13-3916(E)(1) permits a peace officer executing a search warrant to "search any person in the premises . . . if [i]t is reasonably necessary to protect himself or others from the use of any weapon that may be concealed upon the person."

¶8 Here, the conflicts in the evidence presented at the suppression hearing went solely to the weight and credibility of the witnesses' testimony, and we do not intrude upon the trial court's resolution of those conflicts. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004) (trial court determines credibility of witnesses); *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994) (same). Thus, we are left with testimony that Maddux conducted a pat-down search of Michitsch based on his belief that Michitsch might be armed and carrying methamphetamine for sale. These beliefs were reasonable based on the combination of Teresa's statements and body language, Maddux's experiences with methamphetamine investigations, and Michitsch's statement that his name was "John." These combined factors constituted more than a mere "unparticularized suspicion or 'hunch'" and justified the trial court's finding that the pat-down search was lawful. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883.

¶9 Michitsch next argues the pat-down search nevertheless exceeded its lawful scope. He first contends Maddux did not perform the search and that, instead, an unidentified officer removed a bag from Michitsch's jacket after he had been "dragged into the house." As noted above, we do not revisit evidentiary conflicts or credibility issues determined by the trial court. *See Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d at 453; *Salman*, 182 Ariz. at 361, 897 P.2d at 663.

¶10 Michitsch alternatively claims that, even if Maddux performed the search, his testimony that he immediately recognized the methamphetamine by its texture without manipulating it was not credible. But, once again, credibility is an issue for the trial court, and to the extent Michitsch argues an officer could not by plain feel, as a matter of law, recognize methamphetamine by its texture, he is incorrect. *See Minnesota v. Dickerson*, 508 U.S. 366, 374-75, 113 S. Ct. 2130, 2136-37 (1993) (expressly rejecting proposition officers could never identify drugs by plain feel). And the Arizona cases Michitsch cites to support this argument are distinguishable. *See State v. Valle*, 196 Ariz. 324, 326-27, 996 P.2d 125, 127-28 (App. 2000) (no evidence "rolling papers" pulled from defendant's pocket had been "immediately identifiable as contraband" during pat-down search); *In re Pima County Juvenile Delinquency Action No. J-103621-01*, 181 Ariz. 375, 378, 891 P.2d 243, 246 (App. 1995) (after pat-down search revealed no weapons, no "reasonable suspicion of any other activity" justified officer's asking juvenile what was in his pocket and asking to see it). We also note that, in determining the reasonableness of Maddux's actions, the trial court

could consider that Maddux had reason to believe the man he was patting down might be not only armed but also engaged in the delivery of methamphetamine for sale.

¶11 Michitsch also argues that once Maddux saw only a "Crown Royal" bag, no exigent circumstances existed, and he needed additional authorization to lawfully search it. We reject this argument because the contents of the bag had already been lawfully discovered in conformance with constitutional standards, and no additional justification was required. *Dickerson*. Accordingly, we find no abuse of discretion in the trial court's denial of Michitsch's motion to suppress evidence.

¶12 In Michitsch's final argument, he claims we must reverse his conviction because the trial court improperly took judicial notice of the contents of another case file—specifically, a letter the state claimed Teresa had authored. We review this claim for harmless error, *State v. Henderson*, 210 Ariz. 561, ¶ 19-20, 115 P.3d 601, 607 (2005), but find none.

¶13 As the parties correctly agree, a court may take judicial notice of its own files but not of the truth of prior testimony. *See In re Sabino R.*, 198 Ariz. 424, ¶ 4, 10 P.3d 1211, 1212 (App. 2000) (court may take judicial notice of its records); *In re Marriage of Kells*, 182 Ariz. 480, 483, 897 P.2d 1366, 1369 (App. 1995) (court could judicially notice fact affidavit had been filed but not truth of its assertions). These principles were not violated here. The court granted the state's request to "take judicial notice of the contents of the file," which included the presence of the letter in the file. But Teresa denied having authored or signed the letter, and the court observed that there "appear[ed] to be material

differences between the signatures" on the letter and on Teresa's plea agreement, which was also contained in the file. The transcript shows the state also tried unsuccessfully to establish foundation for admission of the letter.

¶14 As a result, the record before us does not contain the letter, and whatever allegedly inconsistent statements of Teresa's it may have contained were not admitted. Thus, despite the state's attempts to impeach her with the letter, Teresa was never actually impeached, nor did the trial court make any finding that it was she who had made the statements in the letter.

¶15 The trial court neither admitted the letter into evidence nor referred to it in explaining its finding that the state's witnesses had been "more credible" than Teresa or Michitsch. We will not presume the court considered evidence it declined to admit. *See State v. Djerf*, 191 Ariz. 583, ¶ 41, 959 P.2d 1274, 1286 (1998) (trial court presumed to disregard inadmissible evidence).

¶16 Because we find no error requiring reversal of Michitsch's conviction or sentence, both are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge